San Diego Law Review

Volume 55
Issue 4 *2018*

Article 6

12-17-2018

A Survivor's Tale: McDonnell Douglas in a Post-Nassar World

Joss Teal

A Survivor's Tale: *McDonnell Douglas* in a Post-*Nassar* World

JOSS TEAL*

TABLE OF CONTENTS

* © 2018 J. Joss Teal. J.D. Candidate 2019, University of San Diego School of Law; B.A. 2012, University of California, Santa Cruz. Several people provided insightful feedback at various stages of this Comment. I am grateful to Professor Miranda McGowan for her valuable feedback, Karina Pundeff for her sharp edits, and Kendall Kraus for her unwavering support. Thanks also to the *San Diego Law Review* Board for the opportunity.

I. INTRODUCTION

"Fear of retaliation is the leading reason why people stay silent . . . ."[1] In recognition of this fact, Congress enacted Title VII, which makes it unlawful for an employer to retaliate against any employee for opposing employer actions that they reasonably believe to be motivated by discrimination.[2]

In 2013, the Supreme Court in *University of Texas Southwestern Medical Center v. Nassar* declared that an employee alleging retaliation must prove that the employer's motive to retaliate against an employee constituted a "but-for" cause of the adverse action by the employer,[3] noting with disapproval that "claims of retaliation are being made with ever-increasing frequency."[4] As lower courts have shifted to the more stringent but-for causation requirement, they have struggled to reconcile the *Nassar* decision with application of the pervasive burden shifting framework set forth in *McDonnell Douglas Corp. v. Green*.[5] In particular, circuit courts have had to determine how *Nassar* affects a plaintiff's burden of proving a *prima facie* case of retaliation. The circuit courts that have addressed this question are currently split between finding that plaintiffs need only establish a weak inference of discrimination at the initial prima facie stage of their case or that plaintiffs must already establish that retaliation was a but-for cause of the employer's adverse action.[6]

---

1. Crawford v. Metro. Gov't of Nashville & Davidson Cty., 555 U.S. 271, 279 (2009) (quoting Deborah L. Brake, *Retaliation*, 90 MINN. L. REV. 18, 20 (2005)). This phenomenon of silence in the face of injustice has most recently been thrust into the public eye in the form of the #MeToo movement. *See* Stephanie Zacharek, Eliana Dockterman & Haley Sweetland Edwards, *Person of the Year 2017: The Silence Breakers*, TIME (Dec. 18, 2017), http://time.com/time-person-of-the-year-2017-silence-breakers/ [https://perma.cc/N8JC-UPB2]. When asked why they remained silent until now, the majority of sexual harassment victims expressed a crushing fear of what would happen to them personally, to their families, or to their jobs if they spoke up. *Id.*

2. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 257, tit. 7, § 704(a) (codified as amended at 42 U.S.C. § 2000e-3(a) (2018)).

3. 133 S. Ct. 2517, 2528–34 (2013).

4. *Id.* at 2531. The percentage of retaliation claims has more than doubled since 1998 to the extent that retaliation is now the most frequently alleged basis of discrimination. *See* OFFICE OF RESEARCH, INFO. & PLANNING, *Charge Statistics (Charges Filed with EEOC): FY 1997 Through FY 2017*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, https://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm [https://perma.cc/AJ2M-YYN9]. In 2015, retaliation claims made up 44.5% of all charges received by the U.S. Equal Employment Opportunity Commission and 35.7% of those claims were Title VII charges. *Id.*

5. *See* 411 U.S. 792, 802 (1973). *McDonnell Douglas* has been cited more frequently than any other decision in employment discrimination law. GEORGE RUTHERGLEN, EMPLOYMENT DISCRIMINATION LAW: VISIONS OF EQUALITY IN THEORY AND DOCTRINE 40 (4th ed. 2017).

6. For a collection of relevant cases, see Foster v. Univ. of Md. E. Shore, 787 F.3d 243, 251 n.10 (4th Cir. 2015).

This Comment examines the application of but-for causation in Title VII retaliation claims post-*Nassar*. Following a brief look into the traditional requirements of a plaintiff's Title VII retaliation claim, Part II assesses the holding in *Nassar* and surveys various courts of appeal holdings in its wake. After examining policy considerations and arguments put forward for each position in Part III, this Comment clarifies the misperception that the *McDonnell Douglas* framework necessarily proves but-for causation. In Part IV, this Comment proposes that the Supreme Court should rectify the split by acknowledging that but-for causation need only be proven at the ultimate stage of a retaliation case and that, under such a requirement, only a strong version of the *McDonnell Douglas* framework will maintain its efficacy.

II. HISTORICAL BACKGROUND

Title VII of the Civil Rights Act was passed in 1964, making it an "unlawful employment practice [to] discriminate against any individual . . . because of such individual's race, color, religion, sex, or national origin."[7] Recognizing that protecting employees from retaliation for enforcing their rights is fundamental to ensuring a workplace free of discrimination, Title VII also makes it unlawful for an employer to discriminate against an employee because they have opposed or complained of unlawful discriminatory conduct.[8]

7. 42 U.S.C. § 2000e-2(a). The Civil Rights Act of 1964 is a general anti-discrimination statute originally called for by President John F. Kennedy to give all Americans the right to be served in facilities that are open to the public and provide greater protection for the right to vote. JOHN F. KENNEDY, *Radio and Television Address on Civil Rights*, *in* PAPERS OF JOHN F. KENNEDY: PRESIDENT'S OFFICE FILES 1, 1–2 (1963), https://www.jfklibrary.org/Asset-Viewer/Archives/JFKPOF-045-005.aspx [https://perma.cc/M92B-4RZ6]. For a discussion of the Civil Rights Act and Title VII in particular, see generally Susan D. Carle, *A Social Movement History of Title VII Disparate Impact Analysis*, 63 FLA. L. REV. 251 (2011).

8. *See* 42 U.S.C. § 2000e-3. Importantly, it is not necessary for plaintiffs to be successful in their underlying discrimination allegations. *See* Learned v. City of Bellevue, 860 F.2d 928, 932 (9th Cir. 1988) ("If the availability of that protection were to turn on whether the employee's charge[s] were ultimately found to be meritorious, resort to the remedies provided by the Act would be severely chilled." (quoting Sias v. City Demonstration Agency, 588 F.2d 692, 695 (9th Cir. 1978))). Retaliation cases can be an easy sell to juries—the story that an employee's boss got angry and fired her because she complained is one that everyone knows and can find plausible. Thus, a jury is not required to believe the boss is actually racist or sexist, just human.

A. McDonnell Douglas *Framework*

When alleging retaliation in violation of Title VII's § 2000-e(3)(a), plaintiffs may prove the violation either through direct evidence of retaliatory purpose[9] or through the *McDonnell Douglas* burden-shifting framework.[10] To prevail under the *McDonnell Douglas* framework, a plaintiff must first establish a prima facie case by showing the following: (1) "she engaged in protected activity"; (2) "her employer took adverse action against her"; and (3) "a causal relationship existed between the protected activity and the adverse employment activity."[11] The plaintiff must prove each element of the prima facie retaliation case by a preponderance of the evidence.[12] Once plaintiffs so prove, defendants then bear a burden of producing admissible evidence that shows they had "a legitimate, non-

---

9. Direct evidence of retaliatory purpose could take several forms, including an email displaying unlawful discriminatory conduct or a production manager saying he would not promote a female employee to the "washman" position because if he did "every woman in the plant would want to go into the washroom." Bell v. Birmingham Linen Serv., 715 F.2d 1552, 1553, 1557 (11th Cir. 1983).

10. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1972). The Court described Title VII's goal to eliminate discrimination while preserving workplace efficiency as follows: "The broad, overriding interest, shared by employer, employee, and consumer, is efficient and trustworthy workmanship assured through fair and . . . neutral employment and personnel decisions. In the implementation of such decisions, it is abundantly clear that Title VII tolerates no . . . discrimination, subtle or otherwise." *Id.* at 801. The burden-shifting framework developed in *McDonnell Douglas* was implemented to get at such "subtle" forms of discrimination. *Id.*

11. *Foster*, 787 F.3d at 250 (quoting Price v. Thompson, 280 F.3d 209, 212 (4th Cir. 2004)). For a thorough analysis of what constitutes materially adverse conduct, see JENNY R. YANG. EQUAL EMP'T OPPORTUNITY COMM'N, NO. 915.004, EEOC ENFORCEMENT GUIDANCE ON RETALIATION AND RELATED ISSUES, at 33–41 (2016).

12. John Sanchez, *The Law of Retaliation After* Burlington Northern *and* Garcetti, 30 AM. J. TRIAL ADVOC. 539, 544 (2007). Part of the root of this dispute is the fact that "causal relationship" language is embedded in the language of the retaliation prima facie case, but not in the status-based prima facie case. *Foster*, 787 F.3d at 250 (quoting *Price*, 280 F.3d at 212). In establishing the framework, the Court addressed a status-based racial discrimination claim wherein they held that a prima facie case is established

> by showing (i) that [the plaintiff] belongs to a racial minority; (ii) that [the plaintiff] applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite [the plaintiff's] qualifications, [the plaintiff] was rejected; and (iv) that, after [the plaintiff's] rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

McDonnell Douglas, 411 U.S. at 802. Courts have been clear that this is not proof of the ultimate fact of causation. *See, e.g.*, Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 254 (1981). The use of the word "causal" in the third prong of the retaliation prima facie requirement has led some circuits to improperly require proof of causation at this preliminary stage. *See infra* Section II.C.1.

retaliatory reason for the adverse employment action."[13] The defendant's burden of production is light and only needs to raise a genuine issue of fact as to whether the defendant acted in a discriminatory manner against the plaintiff.[14] If the defendant meets its burden of production, the burden shifts back to the plaintiff to prove that the defendant's purported non-retaliatory reasons "were not its true reasons, but were a pretext for discrimination."[15]

Many writers, and some courts, have misleadingly used the term "pretext" to refer to the entire final stage of the framework.[16] This is incorrect, as it implies that a plaintiff may win a case at this stage *only* by proving the defendant's reasons are pretextual. In actuality, there are two ways a plaintiff can move forward at the third stage, only one of which implicates pretext. The plaintiff can proceed either by (1) showing the defendant's tendered reason is "unworthy of credence"—the pretext method—or by (2) proving discrimination was the actual reason using some method of proof other than the pretext method.[17]

Thus, under the *McDonnell Douglas* framework, the plaintiff must prove causation at two distinct junctures: (1) the initial causal connection required at the prima facie stage, and (2) the final stage of the framework

13. Hernandez v. Yellow Transp. Inc., 670 F.3d 644, 657 (5th Cir. 2012) (quoting Long v. Eastfield Coll., 88 F.3d 300, 305 (5th Cir. 1996)). However, this burden is not conclusive; a jury may, but need not, find retaliatory intent if a defendant fails to meet this burden. *See infra* note 194 and accompanying text.

14. *Burdine*, 450 U.S. at 254–55.

15. Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 143 (2000) (quoting *Burdine*, 450 U.S. at 253). The Supreme Court created this three-step framework to make it possible to ferret out meritorious discrimination claims, which are notoriously difficult to establish. *See infra* Section II.A.1.

16. *See, e.g.*, *Burdine*, 450 U.S. at 256; Henry L. Chambers, Jr., *The Effect of Eliminating Distinctions Among Title VII Disparate Treatment Cases*, 57 SMU L. REV. 83, 85 (2004); Catherine J. Lanctot, *The Defendant Lies and the Plaintiff Loses: The Fallacy of the "Pretext-Plus" Rule in Employment Discrimination Cases*, 43 HASTINGS L.J. 57, 65–66 (1991); Deborah C. Malamud, *The Last Minuet: Disparate Treatment After* Hicks, 93 MICH. L. REV. 2229, 2234 (1995). Pretext, as a method of proof, is best conceptualized as a chain of permissive inferences. *See infra* Section III.A.

17. *Burdine*, 450 U.S. at 256; *see also* Tristin K. Green, Comment, *Making Sense of the* McDonnell Douglas *Framework: Circumstantial Evidence and Proof of Disparate Treatment Under Title VII*, 87 CAL. L. REV. 983, 984–85, 988 (1999) (noting there are two ways to proceed at the third stage). The most common alternatives to proving pretext at this stage are direct evidence, comparative evidence, and statistics. *See infra* Section II.A.1.

where liability is ultimately determined.[18] Through this mechanism, a plaintiff without direct evidence of retaliation can still prevail because a jury is allowed to infer a hidden retaliatory purpose.[19]

It is important to recognize that the causal requirement needed to establish a prima facie retaliation claim is "less onerous" than the causal requirement needed to prove pretext.[20] If the defendant successfully rebuts the presumption of retaliation and the plaintiff retains the burden of persuasion, the "burden now merges with the ultimate burden of persuading the court that she has been the victim of intentional discrimination."[21] To do so, the plaintiff may show the defendant's explanation was merely pretextual by showing "both that the reason was false, and that discrimination was the real reason."[22] Alternatively, the plaintiff may use a method of proof other than the pretext method.[23]

1. Addressing the Criticisms of McDonnell Douglas

While initially formulated as a helping hand to disparate treatment plaintiffs, *McDonnell Douglas* has been demonized over the years as being ill-suited to address the subtle types of discrimination believed to be most common in the modern workplace.[24] The promulgation of *McDonnell Douglas* as

---

18. Carvalho-Grevious v. Del. State Univ., 851 F.3d 249, 257 (3d Cir. 2017). For a survey of the various ways by which the ultimate burden of persuasion can be established in retaliation cases, see generally YANG, *supra* note 11.

19. *See* Foster v. Univ. of Md. E. Shore, 787 F.3d 243, 250 (4th Cir. 2015) (citing *Reeves*, 530 U.S. at 148). It is important to note this raises only a permissive inference, and the trier of fact is given the freedom of decision. *See Reeves*, 530 U.S. at 148 ("[A] plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated.").

20. *Foster*, 787 F.3d at 251 (quoting Williams v. Cerberonics, Inc., 871 F.2d 452, 457 (4th Cir. 1989)); *see also Burdine*, 450 U.S. at 253 (describing the burden as "not onerous").

21. *Burdine*, 450 U.S. at 254–56.

22. St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 515 (1993) (emphasis omitted). This explanation that *McDonnell Douglas* requires discrimination to be the "real reason" has led some circuits to believe that the framework has always required but-for causation. *See infra* Section II.C.2.

23. For a discussion of alternative methods of proof, see *infra* Section II.A.1.

24. Most criticism has stemmed from limitations placed on the framework by the Supreme Court and the fact that plaintiffs have not been faring well in court despite the perception that employment discrimination remains prevalent. *See, e.g.*, Chambers, *supra* note 16, at 99–100; Chad Derum & Karen Engle, *The Rise of the Personal Animosity Presumption in Title VII and the Return to "No Cause" Employment*, 81 TEX. L. REV. 1177, 1181 (2003); Tristin K. Green, *Discrimination in Workplace Dynamics: Toward a Structural Account of Disparate Treatment Theory*, 38 HARV. C.R.-C.L. L. REV. 91, 111 (2003); Melissa Hart, *Subjective Decisionmaking and Unconscious Discrimination*, 56

a hindrance to plaintiffs—rather than suggesting a move away from the framework, as many pundits suggest—demonstrates a fundamental misunderstanding of the framework and its purpose.[25]

Proving discriminatory causation is tough because there are very few ways by which to do so.[26] Defendant admissions work, but unsurprisingly, such admissions are extraordinary.[27] Also, as employers have become litigation-seasoned, statements by decision makers that do not amount to admissions, but nevertheless suggest bias, have become increasingly rare.[28] Another method is through the use of statistics, but the large number of decisions required by decision makers makes this method unlikely and the need for experts too costly in most cases.[29] Finally, a plaintiff may prove

---

ALA. L. REV. 741, 758 (2005); Malamud, *supra* note 16, at 2235 n.28 (discussing the outcry in commentary about *Hicks* and its limitation of *McDonnell Douglas*).

25. Indeed, some pundits even suggest *McDonnell Douglas* is either doctrinally or functionally dead. Charles A. Sullivan, *Disparate Impact: Looking Past the* Desert Palace *Mirage*, 47 WM. & MARY L. REV. 911, 935 (2005); *see also* Chambers, *supra* note 16, at 88–89; Jeffrey A. Van Detta, *"Le roi est mort; vive le roi!": An Essay on the Quiet Demise of* McDonnell-Douglas *and the Transformation of Every Title VII Case After* Desert Palace, Inc. v. Costa *Into a "Mixed Motives" Case*, 52 DRAKE L. REV. 71, 72 (2003); William R. Corbett, Note, McDonnell-Douglas*, 1973-2003: May You Rest in Peace?*, 6 U. PA. J. LAB. & EMP. L. 199, 200 (2003) (describing *McDonnell Douglas* "dead as a doornail").

26. Linda Hamilton Krieger points out that proving discriminatory causation is difficult because even if the factual record leads one "to believe that race, gender, or national origin 'made a difference,' [Title VII doctrine requires finding either] that the decision maker intended to discriminate or that no discrimination occurred." Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1170 (1995). Such a conflation of intention and causation, Krieger argues, represents a misunderstanding of how cognitive bias works. *See id.*

27. *See id.* at 1167 (describing employer admissions as "careless"); *see also Burdine*, 450 U.S. at 255 n.8 (1981) (observing that proving intentional discrimination is "elusive").

28. *See id.* Audrey J. Lee points out that society's heightened awareness regarding the legal ramifications for discriminatory transgressions has made employers much more skilled at hiding any potentially discriminatory conduct. Audrey J. Lee, Note, *Unconscious Bias Theory in Employment Discrimination Litigation*, 40 HARV. C.R.-C.L. L. REV. 481, 488 (2005) ("[E]mployers' heightened awareness of the legal ramifications for discriminatory transgressions—learned through litigation, among other means—suggests that employers will be increasingly savvy in not documenting, outwardly expressing, or retaining anything that is potentially damaging.").

29. Lee argues that statistical evidence, while very powerful, is often an extremely difficult threshold for plaintiffs to demonstrate at the prima facie stage of litigation. Lee, *supra*, at 496 n.87; *see*, *e.g.*, EEOC v. Joe's Stone Crab, Inc., 220 F.3d 1263, 1275 (11th Cir. 2000) (finding "no statistically-significant disparity" between the percentage of

causation through comparative evidence.[30] However, the comparators' situations are seldom indistinguishable from the plaintiff's situation, often disqualifying the use of such evidence.[31]

By contrast, *McDonnell Douglas* pretext evidence does not depend on expensive statistics, unlikely admissions, overheard statements, or differently treated comparators.[32] Often, pretext evidence will be the only evidence available.[33] If *McDonnell Douglas* were done away with, or never existed in the first place, many plaintiffs lacking direct evidence—but victims of discrimination nevertheless—would lose any chance at a remedy.[34] The framework forces employers to provide a reason for their actions and thus gives plaintiffs a tangible object to attack and discredit.[35] It truly is a benefit to plaintiffs, and its loss would result in one less way of accomplishing

---

women who actually applied and those who were hired as servers, despite no women being hired during the fifty-year period at issue).

30. A plaintiff attempting to prove retaliation using a "comparable non-protected person was treated better" method must produce evidence which at a minimum establishes (1) that he was a member of a protected class and (2) that for the same or similar conduct he was treated differently than "similarly-situated" non-minority employees. Mitchell v. Toledo Hosp., 964 F.2d 577, 582 (6th Cir. 1992); Davis v. Monsanto Chem. Co., 858 F.2d 345, 347 (6th Cir. 1988). Specific factors "include whether the employees (i) held the same job description, (ii) were subject to the same standards, (iii) were subordinate to the same supervisor, and (iv) had comparable experience, education, and other qualifications —provided the employer considered these latter factors in making the personnel decision." Ajayi v. Aramark Bus. Servs., Inc., 336 F.3d 520, 532 (7th Cir. 2003) (citing Paterson v. Avery Dennison Corp., 281 F.3d 676, 680 (7th Cir. 2002)).

31. *See*, *e.g.*, Sublett v. John Wiley & Sons, 463 F.3d 731, 740–41 (7th Cir. 2006) (holding summary judgment appropriate where comparators were not sufficiently comparable to the plaintiff).

32. Whether ratcheting up a plaintiff's burden of proof to but-for was proper is beyond the scope of this Comment. Rather, the focus here is the continued efficacy of the *McDonnell Douglas* framework *despite* the increased burden imposed by *Nassar*. *Compare* McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), *with* Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338 (2013).

33. For a discussion of how the subtle nature of modern discrimination—as opposed to the malignant, blatant discrimination that existed prior to the passage of the Civil Rights Act—has led to increasing use of the *McDonnell Douglas* framework in Title VII cases, see Lee, *supra* note 28, at 482.

34. The framework was devised in part as an answer to the increasing scarcity of so-called *smoking gun* evidence to give plaintiffs without such evidence their day in court. *See* Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 121 (1985) ("The shifting burdens of proof set forth in *McDonnell Douglas* are designed to assure that the 'plaintiff has his day in court despite the unavailability of direct evidence.'" (quoting Loeb v. Textron, Inc., 600 F.2d 1003, 1014 (1st Cir. 1979))); Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 255 n.8 (1981) (stating that the function of the framework is "to sharpen the inquiry into the elusive factual question of intentional discrimination").

35. *See Burdine*, 450 U.S. at 254–56.

the challenging job of proving causation.[36] To get a clear picture of this debate, a brief discussion of but-for causation is instructive.

2. *But-For Causation*

Consider *Burrage v. United States*,[37] wherein the Supreme Court exemplified but-for causation as follows: "where A shoots B, who is hit and dies, we can say that A actually caused B's death, since but for A's conduct B would not have died."[38] In their concurrence, Justices Ginsburg and Sotomayor stressed that the words "because of" were not to be misconstrued as meaning "solely because of."[39] In other words, the same act can be considered a but-for cause if it combines with other factors to produce the outcome, so long as the other factors alone would not have done so.[40] Accordingly, a but-for cause need not be the sole cause, but it must be *the straw that broke the camel's back*. The majority opinion expressed agreement with this understanding via a hypothetical:

> Consider a baseball game in which the visiting team's leadoff batter hits a home run in the top of the first inning. If the visiting team goes on to win by a score of 1 to 0, every person competent in the English language and familiar with the American pastime would agree that the victory resulted from the home run. This is so because it is natural to say that one event is the outcome or consequence of another when the former would not have occurred but for the latter. It is beside the point that the victory also resulted from a host of *other* necessary causes, such as skillful pitching, the coach's decision to put the leadoff batter in the lineup, and the league's decision to schedule the game. By contrast, it makes little sense to say that an event resulted from or was the outcome of some earlier action if the action merely played a nonessential contributing role in producing the event. If the visiting team wound up winning 5 to 2 rather than 1 to 0, one would be surprised

36. Some believe *McDonnell Douglas* might even be functionally dead. *See infra* Section II.C.1.

37. *See generally* Burrage v. United States, 134 S. Ct. 881 (2014).

38. *Id.* at 888 (quoting 1 WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 6.4(b) (2d ed. 2003)).

39. *Id.* at 892 (Ginsburg, J., concurring) (citing Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 379–384 (2013)). It is important in this analysis to understand that the but-for causation standard does not require retaliation to be the *sole cause* of the action; there can be multiple but-for causes and retaliation need only be *a* but-for cause of the adverse action for the employee to prevail. Kwan v. Andalex Grp. LLC, 737 F.3d 834, 846 (2d Cir. 2013) ("'[B]ut-for' causation does not require proof that retaliation was the only cause of the employer's action, but only that the adverse action would not have occurred in the absence of a retaliatory motive.").

40. *See Kwan*, 737 F.3d at 846.

> to read in the sports page that the victory resulted from the leadoff batter's early, non-dispositive home run.[41]

It is helpful in this instance to contrast a but-for causal standard from the previously available motivating factor standard. A but-for factor is a necessary factor because the decision—such as a firing—would not have occurred absent that factor, whereas a motivating factor is one that has a tendency to bring about a decision—such as firing—but is not necessary to that decision.[42] This happens in decisions where a person considers a factor—such as race—but would have made the same decision even had they not considered that factor due to the presence of some other factor—such as tardiness.[43]

B. University of Texas Southwestern Medical Center v. Nassar

Given that they are often raised "in tandem," Title VII retaliation claims and discriminatory claims have historically been considered under the same standard.[44] To prove causation under a status-based discrimination claim, it is enough to show that *a* motive to discriminate was one of the defendant's motives, even if the defendant had other causative legal motives—this is the lessened causation standard known as the "motivating factor" test.[45] Although application of the *McDonnell Douglas* framework also requires the plaintiff in a retaliation claim to establish the element of causation, the framework and its application among circuit courts left it unclear whether the plaintiff must prove motivating-factor causation or a more stringent standard.[46] In *University of Texas Southwestern Medical Center v. Nassar*, the Court drove a wedge through this traditional partnership between discriminatory and retaliation claims when it declared a retaliation claim must meet the stricter but-for causation standard.[47]

---

41. *Burrage*, 134 S. Ct. at 888. Preponderance of the evidence is the evidentiary burden under a but-for *or* motivating causation standard. *See Nassar*, 570 U.S. at 362; *see also* Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 178 n.4 (2009) (emphasizing that under the but-for causation standard "[t]here is no heightened evidentiary requirement").

42. For a more thorough investigation of but-for causation, see Martin J. Katz, *The Fundamental Incoherence of Title VII: Making Sense of Causation in Disparate Treatment Law*, 94 GEO. L.J. 489, 505–07 (2006).

43. *See id.* at 505–06, 513. In *Smith v. Xerox Corp.*, a case preceding *Nassar*, the court affirmed the trial court's judgment in favor of the plaintiff and application of the motivating factor standard where both legitimate and illegitimate motives existed for termination. 602 F.3d 320, 334, 336 (5th Cir. 2010), *abrogated by Nassar*, 570 U.S. 338.

44. *Nassar*, 570 U.S. at 363 (Ginsburg, J., dissenting).

45. *Id.* at 342–44; *see supra* note 43 and accompanying text.

46. In fact, the assumption that the framework itself requires a specific standard of causation represents a fundamental misunderstanding of how pretext evidence works. *See infra* text accompanying notes 140–41.

47. *See Nassar*, 570 U.S. at 362.

In *Nassar,* the University of Texas Southwestern Medical Center had an arrangement with Parkland Memorial Hospital whereby the hospital offered its unoccupied posts to University faculty members.[48] Dr. Nassar, a medical doctor of Middle Eastern descent, worked as both a University faculty member and a staff physician at the hospital.[49] He claimed his supervisor at the University "was biased against him on account of his religion and ethnic heritage."[50] He alleged that the supervisor displayed her bias through undeserved scrutiny of his billing practices and productivity, as well as through her statements like "Middle Easterners are lazy."[51] After arranging to continue working at the hospital without also being on the University's faculty, Dr. Nassar resigned his teaching post and sent a letter stating his departure was due to harassment by his supervisor.[52] Subsequently, the Chair of Internal Medicine expressed consternation at Nassar's accusations and protested his continued employment at the hospital as inconsistent with the affiliation agreement's requirements.[53] "The [h]ospital then withdrew its offer" to continue his employment.[54]

Nassar "alleged two discrete violations [under] Title VII. The first was a status-based discrimination claim under [42 U.S.C.] § 2000e–2(a) . . . alleg[ing] that [the supervisor's] racially and religiously motivated harassment had resulted in his constructive discharge."[55] Second, Nassar claimed that the Chair's efforts to prevent his continued employment at the hospital "were in retaliation for complaining about [the supervisor's] harassment, in violation of § 2000e–3(a)."[56] The jury found for Nassar on both claims; the Fifth Circuit vacated as to the underlying status cause of action but affirmed the retaliation award.[57] It held that Nassar had established that the hospital was "motivated" by a desire to retaliate against him for opposing discrimination.[58] The hospital appealed, arguing Nassar should

48. *Id.* at 338.
49. *Id.*
50. *Id.*
51. *Id.* at 344 (quoting Nassar v. Univ. of Tex. Sw. Med. Ctr, 674 F.3d 448, 450 (5th Cir. 2012)).
52. *Id.*
53. *Id.* at 344–45.
54. *Id.* at 345.
55. *Id.*
56. *Id.* (citing *Nassar v. Univ. of Tex.*, 674 F.3d at 450).
57. *Id.*
58. *Id.* at 345–46.

have had to prove retaliation was a but-for cause of his firing and that he lacked the evidence to satisfy the more stringent burden.[59]

In a 5-4 decision, the Supreme Court sided with the hospital.[60] The majority gave several reasons for its decision. First, it noted that traditional tort principles of causation require a plaintiff to show the harm would not have taken place in the absence of—but-for—the defendant's conduct.[61] These default rules, the Court reasoned, are "presumed to have been incorporated" into Title VII unless the statute indicates otherwise.[62] Second, the Court looked at its decision in *Price Waterhouse v. Hopkins*,[63] where it held that "because of" as used in the status-discrimination provision of Title VII meant "that a plaintiff could [win on a status-based] discrimination [claim if the plaintiff] could show one of the prohibited traits was a 'motivating' . . . factor in the employer's decision."[64] "If the plaintiff made that showing, the burden of persuasion shifted to the [defendant, who could avoid] liability if it could prove that it would have taken the same . . . action in the absence of any discriminatory" attitude.[65] In other words, the defendant must establish "a discriminatory motive was not the but-for cause of" its actions against the plaintiff.[66]

Third, the Court examined its subsequent decision in *Gross v. FBL Financial Services, Inc.*, where it interpreted the phrase "because of . . . age"[67] in the Age Discrimination in Employment Act (ADEA)[68] to mean that age was required to be the but-for cause of the employer's adverse decision.[69] The anti-retaliation provision's use of the very same *because*

---

59. *See id.*
60. *Id.* at 339–40.
61. *Id.* at 346–47 (citing RESTATEMENT OF TORTS §§ 431 cmt. a, 432(1) cmt. a (AM. LAW INST. 1934)).
62. *Id.* at 347.
63. 490 U.S. 228 (1989) (plurality opinion).
64. *Nassar*, 570 U.S. at 348 (citing *Price Waterhouse*, 490 U.S. at 258). *Price Waterhouse* was codified two years later in § 2000e-2(m) of the Civil Rights Act of 1991, stating: "[A]n unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice." 42 U.S.C. § 2000e-2(m) (2018).
65. *Nassar*, 570 U.S. at 348 (citing *Price Waterhouse*, 490 U.S. at 258–60, 276–77).
66. *Id.*
67. 557 U.S. 167, 176 (2009)
68. 29 U.S.C. § 623(a) (2018).
69. *Gross*, 557 U.S. at 176–80. Unfortunately, whether the Court's interpretation of "because of" in the ADEA as calling for a but-for causation standard was appropriate when it was already established that the same language allowed for a mixed-motive standard under Title VII is beyond the scope of this Comment. For an in-depth analysis of the topic, see generally Lauren Smith, Comment, *Motivating Factor Versus But-For Causation in Claims Arising Under the Americans with Disabilities Act*, 48 U. TOL. L. REV. 643 (2017).

of language as the ADEA implied that the but-for standard governed retaliation claims the same as ADEA claims.[70] Fourth, the Court noted that when Congress enacted the Civil Rights Act of 1991 to say a plaintiff's burden is to prove that "race, color, religion, sex, [or] national origin" discrimination motivated an employer but left in place the retaliation provision's *because of* language, it intended to preserve the more stringent but-for standard of causation for retaliation claims.[71] Congress could have applied the motivating factor standard of causation to all unlawful practices but did not, so the Court interpreted the statute according to its plain meaning as the complexity and meticulousness of Title VII demands.[72]

Finally, and perhaps most tellingly, the Court justified its interpretation of the statute on the basis of judicial economy, observing that a lesser causation standard would incentivize employees to file frivolous claims.[73] According to the Court, raising the employer's costs of litigation and the risk of damage to the employer's reputation is "inconsistent with the structure and operation of Title VII."[74] The heightened but-for causation standard thus serves employers and the judicial system by inhibiting frivolous litigation from progressing to trial.[75]

Justice Ginsburg authored a dissent joined by Justices Breyer, Sotomayor, and Kagan, arguing that the relationship between anti-discrimination and anti-retaliation provisions of Title VII requires the same burden of proof because "[a]ntiretaliation provisions 'seek to secure . . . or advance enforcement of antidiscrimination guarantees.'"[76] By passing anti-discrimination legislation, Congress sought to create a workplace where employees are treated equally regardless of race, ethnicity, religion, or sex.[77] Yet anti-discrimination guarantees would be meaningless if employees decided not to file grievances for fear of retaliation.[78] In ruling that a retaliation claim requires proof of but-for causation, Justice Ginsburg argued that the majority has undermined the will of Congress by appropriating a provision meant to strengthen Title VII § 2000e-2(m), separating it from the motivating

70. *See Nassar*, 570 U.S. at 352.
71. *Id.* at 352–62.
72. *Id.* at 353–54.
73. *Id.* at 358–59.
74. *Id.*
75. *See id.* at 358.
76. *Id.* at 363, 367–68 (Ginsburg, J., dissenting) (quoting Burlington N. & Santa Fe Ry. v. White, 548 U.S. 53, 63 (2006)).
77. *See id.* at 367–68.
78. *See id.* at 368 (citing *Burlington*, 548 U.S. at 67).

factor standard of discrimination claims, and thereby "turn[ing] it into a measure reducing the force of the ban on retaliation."[79]

Justice Ginsburg further argued that allocating different standards of causation would in fact hinder judicial economy.[80] Plaintiffs regularly bring retaliation and discrimination claims in the same action and "[c]ausation is a complicated concept to convey to juries in the best of circumstances."[81] Requiring a jury to sort through liability based on multiple standards of causation is almost certain to cause confusion.[82] Additionally, Justice Ginsburg pointed out that a "but-for test is particularly ill-suited to employment discrimination cases."[83] Such a standard requires the jury to determine which one of the employer's multiple motives was the actual impetus for action, a task that may often be impossible given that employers' actions are rarely based on a single motive.[84]

*C. Post-*Nassar *Circuit Application*

While the Court in *Nassar* held that a plaintiff in a Title VII retaliation claim must prove the employer's retaliatory purpose represented a but-for cause of the adverse employment action,[85] the Court made no mention of the ubiquitous *McDonnell Douglas* framework, nor of cases that opt to use the framework due to lack of direct evidence of employer motive.[86] The Court left it to the district and appellate courts to determine whether the plaintiff must prove but-for causation merely at the pretext stage or the prima facie stage as well.[87] Some have even suggested the shift to but-for causation in retaliation suits effectively nullified *McDonnell Douglas*.[88]

---

79. *Id.* at 364, 371–72 (Ginsburg, J., dissenting). For an analysis of how the change of law that resulted from the Supreme Court holding in *Gross* may result in a legal paradigm that favors defendants over plaintiffs in the regulation of age discrimination, see Richard L. Wiener & Katlyn S. Farnum, *The Psychology of Jury Decision Making in Age Discrimination Claims*, 19 PSYCHOL., PUB. POL'Y & L. 395, 407 (2013).

80. *See Nassar*, 570 U.S. at 383 (Ginsburg, J., dissenting).

81. *Id.*

82. *Id.* Questions concerning jury confusion, and competence in general, are not new. In the past, the Supreme Court has suggested courts should consider the practical abilities and limitations of juries in determining if an issue is triable by a jury. *E.g.*, Ross v. Bernhard, 396 U.S. 531, 538 n.10 (1970). Indeed, some courts implied a complexity exception as a result of *Ross*. *See, e.g.*, *In re* Boise Cascade Sec. Litig., 420 F. Supp. 99, 105 (W.D. Wash. 1976); *see also* Bernstein v. Universal Pictures, Inc., 79 F.R.D. 59, 67 (S.D.N.Y. 1978).

83. *Nassar*, 570 U.S. at 384–85 (Ginsburg, J., dissenting).

84. *See id.* at 385.

85. *Id.* at 352.

86. *See generally id.*

87. *Id.* at 363.

88. *See supra* note 25.

1. Circuits Placing the Burden at the Prima Facie Stage

Some circuits have found, post-*Nassar*, that a Title VII retaliation plaintiff must establish but-for cause as part of its prima facie showing.[89] In *EEOC v. Ford Motor Co.*, the plaintiff was "[a] former Ford resale buyer with irritable bowel syndrome" whose performance over the years had steadily dropped to the point where Ford concluded she was not performing "the basic functions of her position."[90] In addition to performing poorly, she apparently "worked on a 'sporadic and unpredictable basis' . . . and had 'chronic attendance issues.'"[91] When the plaintiff was denied her request to work from home on an as-needed basis, she filed a charge of disability discrimination with the Equal Employment Opportunity Commission (EEOC).[92] Ford fired the plaintiff four months later.[93] The EEOC brought an action alleging Ford violated the Americans with Disabilities Act by failing to accommodate the plaintiff's disability and that the company "discharged her in retaliation for filing" a charge with the EEOC.[94] "The district court granted Ford's motion [for summary judgment and] the EEOC appealed . . . ."[95]

Initially foregoing an analysis of the EEOC's prima facie case,[96] the court concluded that Ford met its burden of producing evidence that the plaintiff was fired for nonretaliatory purposes—specifically, "because she was a poor performer."[97] Ford "offered undisputed evidence of back-to-back-to-back poor performance reviews, [the plaintiff's] lacking [of] interpersonal skills, and [the plaintiff's] many absences, which in turn

89. A court placing but-for causation at the prima facie stage would require a plaintiff to show the following: (1) "she engaged in protected activity"; (2) "her employer took adverse action against her"; and (3) but for the protected activity, the adverse employment activity would not have occurred. Foster v. Univ. of Md.–E Shore, 787 F.3d 243, 250 (4th Cir. 2015) (quoting Price v. Thompson, 380 F.3d 209, 212 (4th Cir. 2004)); *see also* Carvalho-Grevious v. Del. State Univ., 851 F.3d 249, 257 (3d Cir. 2017) (citing Moore v. City of Phila., 461 F.3d 331, 340–41 (3d Cir. 2006)); Montell v. Diversified Clinical Servs., Inc., 757 F.3d 497, 504 (6th Cir. 2014).

90. 782 F.3d 753, 758 (6th Cir. 2015).

91. *Id.*

92. *Id.* at 760.

93. *Id.* at 782.

94. *Id.* at 760.

95. *Id.* (citing EEOC v. Ford Motor Co., 752 F.3d 634 (6th Cir. 2014)).

96. It is unclear why the court decided to conduct the prima facie analysis at the end instead of the beginning. Regardless, the timing of the court's analysis does not change the fact that the court required but-for causation at the prima facie stage. *See id.* at 770.

97. *Id.* at 767.

caused mistakes."[98] The court further concluded that the EEOC had failed to produce sufficient evidence upon which a reasonable jury could find that poor performance was not the real reason Ford terminated the plaintiff and that unlawful retaliation was in fact the real reason.[99]

Having so concluded, the court summarily addressed the EEOC's prima facie case at the end of its analysis.[100] In doing so, the court found that "[t]o prevail on a retaliation claim, a plaintiff must 'establish that his or her protected activity was a but-for cause of the alleged adverse action by the employer.'"[101] The court insisted "that the EEOC must present evidence from which a reasonable jury could find that Ford would not have fired [the plaintiff] if she had not made her charge."[102] Thus the court decided, without any real reasoning on the matter, that the new *Nassar* standard applies not merely to a plaintiff's ultimate burden, but also to a plaintiff's burden at the prima facie stage of the *McDonnell Douglas* framework.[103] The EEOC could not demonstrate that Ford would have fired the plaintiff regardless of her EEOC charge, and thus, the court granted summary judgment in favor of Ford.[104]

The dissent argued that even if *Nassar* applied at the prima facie stage, the plaintiff "does not need to prove that Ford never would have fired her, even at some later point, had she not filed her . . . complaint."[105] Even though the plaintiff might have eventually been fired because of her poor performance, the key issue was "whether the EEOC charge . . . was the poison that precipitated that firing to occur at the particular time it did."[106] It would appear that under the majority's interpretation of *Nassar*'s but-for standard, "it would be impossible for employees with performance problems to bring a retaliation claim based on a theory that [the retaliation was not] truly motivate[d]" by the poor performance.[107]

The Sixth Circuit's off hand decision that the *Nassar* standard also applied at the prima facie stage shows how eager courts are to rid themselves of retaliation claims more easily. In *Montell v. Diversified Clinical Services,*

---

98. *Id.*
99. *Id.*
100. *Id.* at 770.
101. *Id.* (quoting Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 362 (2013)).
102. *Id.*
103. *See id.*
104. *Id.*
105. *Id.* at 782 (Moore, J., dissenting) (citing *Nassar*, 570 U.S. 338).
106. *Id.*
107. *Id.* at 783. In essence, the dissent argued that, in addition to failing to distinguish the difference between a prima facie case and proving pretext, the majority also failed to recognize retaliation may still be a but-for cause even if an employee may have had a record of poor performance. For an explanation of but-for causation, see *supra* Section II.A.2.

Inc., the same court, just one year prior, applied *Nassar*'s but-for standard at the ultimate stage of the framework.[108] There, the court noted the burden-shifting framework of *McDonnell Douglas* "presents the risk that litigants and courts will fail to [recognize the difference] between the plaintiff's intermediate and ultimate burdens" of proof.[109] The court further emphasized that the intermediate burdens of the "burden-shifting framework . . . are intended 'to bring the litigants and the court expeditiously and fairly to [its] ultimate question.'"[110] The court concluded that the plaintiff will have to "establish that her protected activity was a but-for cause of the alleged adverse action by the employer."[111] The Sixth Circuit's about-face and reticence to offer any policy arguments may not be based on the most erudite reasoning, but the change at least comports with the Supreme Court's explicit pronouncements in *Nassar*, evincing deep concerns about judicial efficiency and the need to eliminate frivolous claims.[112]

The Third,[113] Tenth,[114] and Eleventh[115] Circuits have demonstrated similar trends toward applying but-for causation at the prima facie stage. An examination of the Eleventh Circuit's evolution of post-*Nassar* case law is illuminating.

In *Ramirez v. Bausch & Lamb, Inc.*—the Eleventh Circuit's first opportunity to apply *Nassar* to a retaliation claim involving circumstantial evidence—the court followed the Supreme Court's lead and declined to clarify at which stage of the proceeding the plaintiff must prove but-for causation, explicitly leaving it to the district courts to fill the jurisprudential void.[116]

---

108. Montell v. Diversified Clinical Servs., Inc., 757 F.3d 497, 504 (6th Cir. 2014).
109. *Id.*
110. *Id.* (quoting Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1981)).
111. *Id.* (quoting Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 362 (2013)).
112. *See Nassar*, 570 U.S. at 358.
113. *See generally* Smith v. City of Allentown, 589 F.3d 684 (3d Cir. 2009). The Third Circuit upheld a finding that the plaintiff failed to produce sufficient evidence to establish a prima facie case that age was a but-for cause of his termination. *Id.* at 691.
114. *See generally* Ward v. Jewell, 772 F.3d 1199 (10th Cir. 2014). Citing *Nassar*'s but-for requirement, the Tenth Circuit upheld a finding that plaintiff failed to present sufficient evidence connecting the adverse employment actions to his participation in EEOC proceedings. *Id.* at 1203.
115. *See generally* Smith v. City of Fort Pierce, 565 F. App'x 774 (11th Cir. 2014) (per curiam). The Eleventh Circuit applied a but-for requirement in analyzing plaintiff's prima facie case in affirming a grant of summary judgment in defendant's favor. *Id.* at 778–79.
116. Ramirez v. Bausch & Lomb, Inc., 546 F. App'x 829, 833 n.2 (11th Cir. 2013).

In its next crack at the issue, the Eleventh Circuit appeared to side with the plaintiff, establishing but-for causation in the pretext stage of the *McDonnell Douglas* framework in *Mealing v. Georgia Dep't of Juvenile Justice*.[117] While discussing the framework, the court said that when the plaintiff establishes a prima facie case, the burden shifts to the defendant to offer a legitimate reason for the adverse action, which, if successful, shifts the burden back to the plaintiff to "show that the legitimate reasons offered by the employer for taking the adverse action were pretexts for unlawful retaliation . . . and that the plaintiff's protected activity was the 'but-for' cause of the adverse action."[118] In its application of the standard, the court held that the plaintiff failed to establish but-for causation because he offered no evidence he would have been terminated but for his complaints.[119] Thus, the Eleventh Circuit appeared to have finally decided to place the plaintiff's burden of proving but-for causation at the pretext stage of the framework.

However, subsequent decisions have seen the Eleventh Circuit make a U-turn and consistently locate the burden in the plaintiff's prima facie case. *Adams v. City of Montgomery*, a per curium decision, marked the Eleventh Circuit's first move toward applying the but-for standard at the prima facie stage.[120] That opinion began by listing the three elements of a prima facie case: "Title VII requires the plaintiff to show that (1) he engaged in an activity protected under Title VII, (2) he suffered an adverse employment action, and (3) there was a causal connection between the protected activity and the adverse employment action."[121] The court immediately thereafter explained that the holding in *Nassar* requires proof that retaliation was the but-for cause of the action, impliedly locating the burden in the prima facie stage.[122] In two subsequent cases, the court again intimated that the plaintiff must meet the burden at the prima facie stage by providing an explanation of *Nassar*'s but-for holding directly after listing the elements of a prima facie case.[123]

---

117. Mealing v. Ga. Dep't of Juvenile Justice, 564 F. 421, 427 (11th Cir. 2014).

118. *Id.* (first quoting Brown v. Ala. Dep't of Transp., 597 F.3d 1160, 1181 (11th Cir. 2010); and then citing Pennington v. City of Huntsville, 361 F.3d 1262, 1266 (11th Cir. 2001)).

119. *Id.* at 429.

120. *See* 569 F. App'x 769, 772 (11th Cir. 2014) (per curiam).

121. *Id.* (citing Crawford v. Carroll, 529 F.3d 961, 970 (11th Cir. 2008)).

122. *Id.* at 772–73 (quoting Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 339 (2013)). While not explicitly stated, there is a strong implication that the court drew from the "causal connection" language of prong three that proof of but-for causation is required at the prima facie stage. *Id.* at 772–73.

123. *See* Jones v. Suburban Propane, Inc., 577 F. App'x 951, 954–55 (11th Cir. 2014); Jackson v. UPS, Inc., 593 F. App'x 871, 877 (11th Cir. 2014).

In *Swindle v. Jefferson County Commission*, the Eleventh Circuit finally unambiguously located the burden within the prima facie stage of the case.[124] Subsequent decisions show a definite pattern of placing the burden in the prima facie stage rather than the pretext stage.[125] The fact that every decision on this matter in the Eleventh Circuit has come in an unpublished per curiam opinion suggests that the court is reticent to clear up the uncertainty. This mirrors the Supreme Court's failure to detail exactly how its holding would work in practice.

Regardless, district courts have followed the pattern set by the unpublished opinions and have settled on applying the burden at the prima facie stage.[126] These district courts have also followed the circuit court's lead by failing to provide any detailed reasoning as to why *Nassar*'s but-for requirement should apply at the prima facie stage.[127] The most that could be extrapolated from the Eleventh Circuit's stance are policy arguments in favor of judicial economy and the elimination of frivolous claims, but its unwillingness to argue on behalf of its position suggests that the Eleventh Circuit's deference to the circuit courts on the ground level has been less than successful.

2. Circuits Placing the Burden at the Pretext Stage

Other courts have held, either expressly or implicitly, that *Nassar* did not alter the elements of a prima facie case as stipulated by the *McDonnell Douglas* framework.[128]

The Third Circuit held in *Carvalho-Grevious v. Delaware State University* that *Nassar* only applied to a plaintiff's ultimate burden.[129] The case involved

124. *See* Swindle v. Jefferson Cty. Comm'n, 593 F. App'x 919, 929 n.10 (11th Cir. 2014) (explaining that the prima facie case requires a showing that the plaintiff's "protected activity was a 'but for' cause of the harassment").

125. *See* Rives v. Lahood, 605 F. App'x 815, 818–19 (11th Cir. 2015) (first quoting Bryant v. Jones, 575 F.3d 1281, 1307–08 (11th Cir. 2009); and then quoting *Nassar*, 580 at 362); Clark v. S. Broward Hosp. Dist., 601 F. App'x 886, 899 (11th Cir. 2015); Baroudi v. Sec'y, U.S. Dep't of Veterans Affairs, 616 F. App'x 899, 902 (11th Cir. 2015) (first citing Brown v. Ala. Dep't of Transp., 597 F.3d 1160, 1181 (11th Cir. 2010); and then citing *Nassar*, 570 U.S. at 362); Torres-Skair v. Medco Health Sols., Inc., 595 F. App'x 847, 857 (11th Cir. 2014) (first citing Dixon v. Hallmark Cos., 627 F.3d 849, 856 (11th Cir. 2012); and then citing *Nassar*, 570 U.S. at 362).

126. *See supra* notes 124–125 and accompanying text.

127. *See, e.g.*, *Swindle*, 593 F. App'x at 929 n.10.

128. Thus, at the initial prima facie stage, a plaintiff need only give evidence sufficient to raise the inference that her engagement in a protected activity was the *likely reason* for the adverse employment action, not the but-for reason.

129. Carvalho-Grevious v. Del. State Univ., 851 F.3d 249, 253 (3d Cir. 2017).

an appeal from a district court's order of summary judgment in favor of the defendant.[130] The plaintiff in this case, Dr. Carvalho-Grievious, had sued her former employer, Delaware State University.[131] She had been dismissed as chairperson of the Department of Social Work at the University, and she claimed "the premature termination of her term as chairperson was unlawful retaliation for her complaints about [the Dean's] sexual harassment, racial discrimination, and related retaliation."[132] Her case relied in part on suspicious timing—a month after complaints about the harassment, the University decided to terminate her employment at the end of the school year.[133] Although the University argued it removed her from her chairperson position and revised her contract because of her "inability to work collegially," Dr. Grevious claimed that at the meeting to discuss her termination, the provost admitted his recommendation was based on her filing of the EEOC charge, and that the ultimate decision was unrelated to her teaching or professional performance.[134] The provost denied "making such admissions . . . and claim[ed] the decision was based on Dr. Grevious's documented interpersonal conflict with the University."[135] "Dr. Grievous filed an additional EEOC charge upon her termination, alleging the University retaliated against her for filing the charges."[136]

After exhausting her administrative remedies, Dr. Grevious filed suit in the district court for the District of Delaware, alleging "that by retaliating against her for complaining about discriminatory employment practices based on race and gender, the University violated Title VII of the Civil Rights Act of 1964."[137] The district court granted summary judgment in favor of the University, finding Dr. Grievous failed to establish a prima facie case of causation because "no reasonable jury could find that, but for [her] complaints . . . she would have been retained . . . ."[138]

On appeal, the Third Circuit Court of Appeal considered "whether a plaintiff asserting a Title VII retaliation claim must establish but-for causation as part of her prima facie case pursuant to" *Nassar*.[139] The court held that just as "the 'but-for' causation requirement in proving claims under the Age Discrimination in Employment Act" did "not conflict with

130. *Id.*
131. *Id.*
132. *Id.* at 255.
133. *Id.*
134. *Id.* at 255–56.
135. *Id.* at 256.
136. *Id.*
137. *Id.* at 253.
138. *Id.* at 256 (citing Carvalho-Grevious v. Del. State Univ., No. 13-1386, 2015 WL 5768940, at *5 (D. Del. Sept. 30, 2015)).
139. *Id.* at 253 (citing Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338 (2013)).

[its] continued application of the *McDonnell Douglas* paradigm," the "'but-for' causation standard required by *Nassar*" does not preclude application of *McDonnell Douglas*.[140] Although the burden of *production* might shift back and forth under the *McDonnell Douglas* framework, the plaintiff retains the "ultimate burden of *persuasion* at all times," and thus *McDonnell Douglas* has no effect on the standard of causation that the plaintiff must prove "as part of her ultimate burden of persuasion."[141] In other words, the framework does not care what burden of persuasion is applied, so long as the burdens of production shifts at the appropriate stages.

Further, the Third Circuit's earlier formulations of the causation standard—"determinative effect" or "real reason"—"differ in terminology" from the Supreme Court's but-for standard, but "they are functionally the same."[142] In finding that *McDonnell Douglas* has no effect on the burden of persuasion and that *Nassar*'s but-for requirement was already in effect in the Third Circuit, the court concluded that staying consistent with *McDonnell Douglas*'s precedential application was appropriate.[143] Thus, "at the prima facie stage, a plaintiff need only [give] evidence sufficient to raise the inference that her engagement in a protected activity was the *likely reason* for the adverse employment action, not the but-for reason."[144] Although the Third Circuit acknowledged the *Nassar* Court's concern that a lesser causation standard could "contribute to the filing of frivolous claims,"[145] the Third Circuit pointed out that Federal Rules of Civil Procedure 11's certification requirements were put in place for just that purpose.[146]

140. *Id.* at 257 (quoting Smith v. Allentown, 589 F.3d 684, 691 (3d Cir. 2009)).

141. *Id.* (emphasis added) (quoting Daniels v. Sch. Dist. Of Phila., 776 F.3d 181, 193 (3d Cir. 2015)). The court correctly deduced that *McDonnell Douglas* functions as a burden shifting framework that provides a method of proving causation but does not specify a causal standard. *See infra* Part IV.

142. *Carvalho-Grevious*, 851 F.3d at 258. To the extent the Third Circuit implies *McDonnell Douglas* already proves but-for causation, this Comment disagrees. *See infra* text accompanying note 189.

143. *See Carvalho-Grevious*, 851 F.3d at 258–59.

144. *Id.* at 253.

145. Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 358 (2013).

146. *Carvalho-Grevious*, 851 F.3d at 259. Rule 11 of the Federal Rules of Civil Procedure insists attorneys certify that any papers filed with the court are "well grounded in fact," legally plausible, and not put forth for an "improper purpose." Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 393 (1990). An attorney who violates Rule 11 will be sanctioned. *Id.*

The Fourth Circuit came to the same conclusion in *Foster v. University of Maryland–Eastern Shore.*[147] In *Foster*, the plaintiff was hired as a campus police officer "subject to a standard six-month probationary period."[148] A month into her employment, the plaintiff complained to her supervisors that a coworker had sexually harassed her.[149] Although the coworker's conduct was immediately and appropriately resolved, the plaintiff claimed her probation was extended an additional six months in retaliation for her complaints.[150] The plaintiff further alleged "the University retaliated against her over the next several months by changing her schedule without notice, denying her tuition remission, denying her light duty following an injury, and barring her from attending a training session while she was on injury leave."[151] Within a month after the plaintiff's last complaint, she was terminated without explanation.[152] The University's Director of Human Resources candidly asserted one reason for firing the plaintiff was that she "was fixated on her harassment experience and became preoccupied with it" to the extent that she had become "an 'unacceptable fit' for the position of police officer."[153]

After working through the *McDonnell Douglas* framework, the district court denied the defendant's summary judgment motion because a "'reasonable jury could find that the instances which Defendant made it more difficult for Plaintiff to work and attend training' demonstrated retaliatory animus that was 'causally related' to her termination," and "a reasonable jury could conclude that the proffered reasons for termination were pretextual."[154] The *Nassar* decision came down following the district court's denial of the defendant's summary judgment motion and the defendant filed a motion for reconsideration in light of the new but-for requirement.[155] Upon reconsideration, the court granted summary judgment in favor of the defendant, concluding that although a reasonable jury could find a "causal link" between the complaint and the plaintiff's termination, it could not find that "her protected activity was the determinative reason for her termination under [the new] *Nassar*" standard.[156] The plaintiff made a timely appeal.[157]

---

147. 787 F.3d 243, 246 (4th Cir. 2015).
148. *Id.*
149. *Id.*
150. *Id.* at 246–47.
151. *Id.* at 247.
152. *Id.*
153. *Id.* at 246–47.
154. *Id.* at 248.
155. *Id.*
156. *Id.*
157. *Id.*

The Fourth Circuit Court of Appeals acknowledged that *Nassar* clearly "altered the causation standard for claims based on direct evidence of retaliatory animus by rejecting the 'mixed motive' theory of liability for retaliation claims," but pointed out that *Nassar* did not address the "pretext framework" the plaintiff used in this case.[158] As such, whether *Nassar* has any bearing on the causation prong of the prima facie case is up for debate.[159]

As an initial matter of analysis, the court correctly pointed out that the causation standards for establishing a prima facie retaliation case and proving pretext are not identical.[160] At the prima facie stage, the burden is meant to be "less onerous." According to the court, "applying the ultimate causation standard at the prima facie stage [would be the same as] eliminating the *McDonnell Douglas* framework [altogether] in retaliation cases by [limiting] the use of pretext evidence to those plaintiffs who do not need it."[161] In other words, if a "plaintiff[] can prove but-for causation at the prima facie stage, [the plaintiff] will necessarily be able to satisfy the[] ultimate burden of persuasion without proceeding through a pretext analysis."[162] By the same logic, a plaintiff who cannot satisfy the ultimate burden of persuasion without support of pretext evidence would never make it past the prima facie stage to reach the pretext stage.[163] "Had the *Nassar* Court intended to retire *McDonnell Douglas* and set aside 40 years of precedent," the court concluded, "it would have spoken plainly and clearly to that effect."[164]

Having determined "that *Nassar* does not alter the causation prong of a prima facie case of retaliation," the court next considered *Nassar*'s effect on "the pretext stage of the *McDonnell Douglas* framework."[165] Similar to *Carvalho-Grevious*, the court concluded that because the framework already requires plaintiffs to prove retaliation was the actual reason for the challenged employment action, *Nassar* has no effect.[166] According to the court, the ultimate burden of persuasion under *McDonnell Douglas* requires

158. *Id.* at 249–50.
159. *See id.* at 250–51.
160. *Id.* at 251; *see supra* Section II.A.
161. *Id.*
162. *Id.*
163. *See infra* Part III.
164. *Foster*, 787 F.3d at 251.
165. *Id.* at 251–52.
166. *Id.* at 252. This Comment disagrees with the contention that *McDonnell Douglas* necessarily proves but-for causation. *See infra* Section III.A.

a plaintiff to establish "both that the employer's reason was false and that retaliation was the real reason for the challenged conduct."[167] A plaintiff who can meet the *McDonnell Douglas* "real reason" standard—that retaliation was "the real reason for the adverse employment action"—"will necessarily . . .'show that the harm would not have occurred in the absence of—that is, but for—the defendant's conduct.'"[168]

Having established that *Nassar* does not alter the legal standard for adjudicating a *McDonnell Douglas* retaliation claim, the court found that the district court erred in granting summary judgment in favor of the University.[169] The court determined a "reasonable jury could [find] that the University's proffered justifications" were pretextual and that the "actual reason for firing [the plaintiff] was to retaliate against her for complaining about [the] alleged sexual harassment and for her subsequent complaints of ongoing retaliation."[170] In other words, a reasonable jury could find the plaintiff would not have been terminated but for her employer's retaliatory animus.[171]

The Second,[172] Fifth,[173] Sixth,[174] and Eleventh Circuits[175] have all referenced similar arguments as those expressed in *Carvalho-Grevious* and *Foster* to state that *Nassar* does not alter the elements of a prima facie case as stipulated by the *McDonnell Douglas* test.

---

167. *Foster*, 787 F.3d at 252 (quoting Jiminez v. Mary Wash. Coll., 57 F.3d 369, 378 (4th Cir. 1995)).

168. *Id.* (first quoting Holland v. Wash. Homes, Inc., 487 F.3d 208, 218 (4th Cir. 2007); and then quoting Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 346–47 (2013)).

169. *Id.* at 246.

170. *Id.* at 254.

171. *Id.*

172. *See generally* Kwan v. Andalex Grp. LLC, 737 F.3d 834 (2d Cir. 2013). The Second Circuit explicitly held that the but-for causation standard established by *Nassar* "does not alter the plaintiff's ability to demonstrate causation at the prima facie stage on summary judgment or at trial indirectly through temporal proximity." *Id.* at 845.

173. *See generally* Hague v. Univ. of Tex. Health Sci. Ctr. at San Antonio, 560 F. App'x 328 (5th Cir. 2014); Feist v. La. Dep't of Justice, Office of the Att'y Gen., 730 F.3d 450 (5th Cir. 2013). In both *Hague* and *Feist*, the Fifth Circuit assumed the plaintiff had established a prima facie case before continuing on to ask whether the plaintiff had established but-for causation during the pretext stage. *See Hague*, 560 F. App'x at 335–36; *Feist*, 730 F.3d at 454.

174. *See generally* Montell v. Diversified Clinical Servs., Inc., 757 F.3d 497 (6th Cir. 2014). The Sixth Circuit refused to raise the evidentiary standard for the causation determination to survive summary judgment. *Id.* at 507.

175. *See generally* Butterworth v. Lab. Corp. of Am. Holdings, 581 F. App'x 813 (11th Cir. 2014) (per curiam). The Eleventh Circuit explained that, assuming the plaintiff had established a prima facie case of retaliation, she would still be unable to establish a but-for causal connection, thus implying a lesser causal standard for the prima facie case. *Id.* at 817.

III. *NASSAR'S* EFFECT ON *MCDONNELL DOUGLAS*

The Supreme Court's holding that Title VII retaliation claims are subject to a but-for causal requirement has certainly thrown a monkey wrench into the application of the *McDonnell Douglas* framework.[176] Though federal courts have been extremely cagey about providing any detailed reasoning as to the impact of *Nassar* on *McDonnell Douglas*, a survey of the cases reveals the general policy considerations underlying two main camps.

In the prima facie stage camp, the main policy considerations appear to be deep concerns about judicial efficiency and the need to mitigate frivolous claims.[177] According to this camp, because *Nassar* will require the plaintiff to prove at some stage in the burden-shifting framework that the defendant's retaliatory purpose actually caused the adverse action, a plaintiff that cannot make a prima facie case of retaliation could never establish that the defendant's reason was a mere pretext.[178] In this way, district courts could dismiss more Title VII retaliation claims at the summary judgment stage and avoid the time and monetary expense of trial. Arguments based on judicial efficiency and the elimination of frivolous claims, while maybe not based on the most adroit legal reasoning, at least have the virtue of aligning with the Supreme Court's explicit assertions in *Nassar*.[179] The hypothetical scenario painted by the Supreme Court, where an employee files a baseless discrimination charge just before an anticipated termination, suggests a powerful fear on the part of the judiciary that district courts are wasting time and money on fraudulent claims.[180]

---

176. *See supra* Section II.C.

177. *See supra* Section II.C.2.

178. *Cf.* Montgomery v. Bd. of Trustees of the Univ. of Alabama, No. 2:12-CV-2148-WMA, 2015 WL 1893471, at *3 (N.D. Ala. Apr. 27, 2015) (citing Bermudez v. TRC Holdings, Inc., 138 F.3d 1176, 1179 (7th Cir. 1998)) (relying on Judge Easterbrook's reasoning that applying a lesser causation standard at the prima facie stage would merely prolong frivolous claims).

179. *See* Univ. of Texas Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 358 (2013). The third element of a prima facie retaliation claim requires that a causal relationship have existed between the protected activity and the adverse employment activity. *See supra* note 11. Although not stated explicitly by any of the courts referenced in this Comment, there is some indication that courts applying a but-for requirement at the prima facie stage drew from this *causal relationship* language that proof of but-for causation is required at the prima facie stage.

180. *See id.* Indeed, this fear may be well founded given the prolific rise of retaliation claims over the last twenty years. *See* OFFICE OF RESEARCH, INFO. & PLANNING, *supra* note 4. Conversely, it may be indicative of a culture coming to grips with the

On the other hand, advocates of the pretext stage cite the Supreme Court's worry in *Burdine* of overburdening the plaintiff at the prima facie stage and the need to preserve the traditional *McDonnell Douglas* framework.[181] According to the Fourth Circuit in *Foster*, and presumably to the other circuits in this camp, applying the ultimate causation standard at the prima facie stage would be the same as eliminating the *McDonnell Douglas* framework altogether by limiting the use of pretext evidence to those plaintiffs who do not need it.[182] Requiring the plaintiff to prove but-for causation at the prima facie stage would contradict the Supreme Court's ruling that the prima facie burden must not be onerous.[183]

Further, the courts in *Foster* and *Carvalho-Grevious* argued that the pretext stage already appears to be another label for but-for causation.[184] According to these courts, the ultimate burden of persuasion under *McDonnell Douglas* already requires the plaintiff to establish "both that the employer's reason was false and that retaliation was the real reason for the challenged conduct."[185] As this Comment argues in the next section, this is a misperception of what the *McDonnell Douglas* framework ultimately proves and leads to the incorrect assumption that the pretext stage already effectively required the plaintiff to meet *Nassar*'s but-for causation requirement. Nevertheless, the courts in this camp correctly deduced that applying the holding of *Nassar* to a prima facie case of retaliation would upend decades of *McDonnell Douglas* jurisprudence by placing a strong burden on the plaintiff's initial case, preventing meritorious claims from proceeding to the pretext stage, and rendering—in effect—the pretext stage redundant for plaintiffs with strong enough cases to reach it.

---

pervasive nature of discrimination and cognitive biases. *See* Zacharek, Dockterman & Edwards, *supra* note 1.

181. *See* Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1981) ("The burden of establishing a prima facie case of disparate treatment is not onerous.").

182. *See* Foster v. Univ. of Md.–E. Shore, 787 F.3d 243, 251 (4th Cir. 2015) ("If plaintiffs can prove but-for causation at the prima facie stage, they will necessarily be able to satisfy their ultimate burden of persuasion without proceeding through the pretext analysis. Conversely, plaintiffs who cannot satisfy their ultimate burden of persuasion without the support of pretext evidence would never be permitted past the prima facie stage to reach the pretext stage.").

183. *See Burdine*, 450 U.S. at 253. The prima facie case is meant only to "eliminate[] the most common nondiscriminatory reasons" for the adverse action, thereby giving rise to an inference of unlawful retaliatory motive. *Id.* at 253–54.

184. Carvalho-Grevious v. Del. State Univ., 851 F.3d 249, 258 (3d Cir. 2017); *Foster*, 787 F.3d at 252.

185. *Foster*, 787 F.3d at 252 (quoting Jiminez v. Mary Wash. Coll., 57 F.3d 269, 278 (4th Cir. 1995); *see also Carvalho-Grevious*, 851 F.3d at 258 (quoting Moore v. City of Phila., 461 F.3d 331, 341 (3d Cir. 2006)). Such an assumption may be in violation of the Supreme Court's imperative not to conflate but-for causation with sole causation. *See supra* note 39 and accompanying text.

A. Satisfying McDonnell Douglas *Does Not Necessarily Establish But-For Causation*

Although the courts that advocate for placing the burden at the pretext stage present a convincing argument, a more thorough examination of their interpretation of *McDonnell Douglas* reveals significant flaws. As previously explained, the *Nassar* decision eliminated the motivating factor standard for proving causation in retaliation claims—first introduced in *Price Waterhouse* and then codified in the Civil Rights Act of 1991.[186] A motivating factor, to reiterate, is one that has a tendency to bring about a decision, but does not rise to the level of being necessary to that decision.[187] By contrast, a but-for factor is one in whose absence the decision would not have occurred.[188] While the *McDonnell Douglas* framework forces employers to provide a reason for their actions, thereby giving plaintiffs a tangible object to attack and discredit, it does not necessarily prove but-for causation.[189]

To see this, it is important to understand that *McDonnell Douglas* works through a chain of inferences, rather than a process of elimination. In other words, "a plaintiff that successfully uses *McDonnell Douglas* to

186. Price Waterhouse v. Hopkins, 490 U.S. 228, 249, 259, 268–69, 276 (1989); 42 U.S.C. § 2000e-2(m) (2018) (establishing that a plaintiff must show that a protected characteristic was a "motivating factor" in the materially adverse decision); *id.* § 2000e-5(g)(2)(B) (providing that once a plaintiff has shown a 2000e-2(m) violation, the defendant may demonstrate it would have taken the same action absent consideration of the protected characteristic). Whether such elimination was proper and required according to traditional tort principles is beyond the scope of this Comment. *See generally* Kimberly A. Pathman, *Protecting Title VII's Antiretaliation Provision in the Wake of* University of Texas Southwestern Medical Center v. Nassar, 109 NW. U.L. REV. 475 (2015) (arguing for stopgap measures to protect employees from *Nassar*'s adverse effects, as well as a reinterpretation of but-for causation through modern tort law principles); Katherine Stark Todd, *But-for* Nassar, *There Would Not Be a Causation Conundrum in Title VII Retaliation Litigation: How* University of Texas Southwest Medical Center v. Nassar *Makes It Harder for Employees to Prevail*, 21 SUFFOLK J. TRIAL & APP. ADVOC. 288 (2016) (arguing that *Nassar* improperly requires but-for causation at the prima facie stage); Matthew A. Krimski, Note, University of Texas Southwestern Medical Center v. Nassar: *Undermining the National Policy Against Discrimination*, 73 MD. L. REV. 132 (2014) (arguing that requiring but-for causation undermines the national policy against discrimination).

187. *See supra* Part II.A.2.

188. *See supra* note 42 and accompanying text.

189. *See supra* note 35 and accompanying text.

prove discrimination does not eliminate all nondiscriminatory reasons for the [alleged retaliatory] action."[190] Consider the following example:

> Suppose that in a race discrimination case the defendant claimed to have based its decision to fire the plaintiff on two nondiscriminatory factors: poor performance on a project and excessive tardiness. And suppose that the plaintiff proves that one of those reasons (poor performance on the project) was incorrect, but fails to prove that the second reason (excessive tardiness) was incorrect; that is, suppose that the plaintiff was excessively tardy. Based on the fact that the first proffered reason (poor performance) was erroneous, the factfinder might proceed down the *McDonnell Douglas* chain of inferences to find discrimination. The factfinder might find that the claim of poor performance was a lie, a cover-up, and designed to conceal discrimination. But the factfinder might nevertheless conclude that the plaintiff was excessively tardy.[191]

Thus, it is possible that a plaintiff can use *McDonnell Douglas* to prove retaliatory purpose by disproving a defendant's given reason without disproving the employer's other nonretaliatory purposes for the action. In such a case, despite the fact that pretext has been proven, if the other nonretaliatory reasons, standing by themselves, would have caused the same decision, then the retaliatory purpose would not be a but-for cause.

Thus, the pretext camp reasoning—that the *Nassar* holding had no effect on the pretext stage of *McDonnell Douglas* because the pretext stage already required plaintiffs to prove that retaliation was the *actual* reason for the challenged employment action—is based on a misunderstanding of the framework's mechanics.[192] *McDonnell Douglas* does not work through a process of elimination by which all other nondiscriminatory reasons are eliminated, but rather through a series of inferences.[193] The factfinder can infer discrimination from the fact of the lie because when someone attempts to cover something up, it can be inferred that they did so to avoid liability. However, the problem is that this inference arises whether the protected activity was a but-for cause or merely a motivating factor of the liar's decision. The belief that an employer would not attempt to hide a retaliatory motive if such a motive was not the reason for making the adverse employment action is misplaced. A defendant is still incentivized

---

190. Martin J. Katz, *Reclaiming* McDonnell Douglas, 83 U. NOTRE DAME L. REV. 109, 134 (2007).

191. *Id.*

192. *See* Carvalho-Grevious v. Del. State Univ., 851 F.3d 249, 258 (3d Cir. 2017); Foster v. Univ. of Md.–E. Shore, 787 F.3d 243, 252 (4th Cir. 2015). Indeed, both courts' belief that the framework requires retaliation to be the real reason for the adverse action seems to go beyond just proving but-for cause, but also sole cause.

193. Understanding this chain of inferences is essential to understanding the limits of *McDonnell Douglas*. The pretext method of proof works through a chain of inferences in which none of the links in the chain, standing alone, prove discrimination. Rather, it is the entire chain of permissive inferences—from mistake, to lie, to cover-up, to discrimination—that proves discrimination. *See* Katz, *supra* note 190.

to cover up a retaliatory motive even if the other factors might have precipitated the same action, that is, even if the retaliatory motive was only a motivating factor. As the Supreme Court explained in *St. Mary's Honor Center. v. Hicks*, "rejection of the defendant's proffered reasons will *permit* the trier of fact to infer the ultimate fact of intentional discrimination," but not necessarily compel such a decision.[194] Standing alone, showing that a defendant's proffered reason is false will not always be sufficient evidence of discrimination; pretext does not necessarily prove but-for causation.

The fact that *McDonnell Douglas* does not necessarily prove but-for causation, however, does not mean that it is irrelevant.

IV. *MCDONNELL DOUGLAS*'S SURVIVAL STORY

McDonnell Douglas does not specify a causal standard, despite what the pretext camp suggests. In other words, the alternative methods—*Price Waterhouse* and the 1991 Act—specify causal standards—motivating factor or but-for causation—*McDonnell Douglas* does not. Rather, it provides a method of *proving* causation. The alternative methods merely specified a causal standard—they did not provide a method of proving it. Under such an understanding, *McDonnell Douglas* could be used either in a weak fashion to prove motivating factor or in a strong fashion to prove but-for causation. As it stands, the framework only necessarily proves motivating factor. Because but-for causation is now required, a strong version of *McDonnell Douglas* that actually proves such a causal standard should also be required.

Currently, *McDonnell Douglas* necessarily proves motivating factor causation, not but-for causation. As explained earlier, retaliatory animus could be a motivating factor, but not also a but-for factor, if there is another independently sufficient factor that motivated the employer's action. If the jury finds one of the reasons proffered by the employer was a lie and that the employer indeed had a retaliatory reason to fire the employee, but the employee was such a terrible employee that the employer was going to fire the employee anyway, then the second factor is independently

194. 509 U.S. 502, 508–11 (1993). This was in response to the Eighth Circuit setting aside a determination in favor of the defendants because "once [the plaintiff] proved all of [the defendants'] proffered reasons for the adverse employment actions to be pretextual, [the plaintiff] was entitled to judgment as a matter of law." *Id.* at 508 (quoting Hicks v. St. Mary's Honor Ctr., 970 F.2d 487, 492 (8th Cir. 1992)).

sufficient and retaliation was a motivating factor, but not a but-for factor. The employer would have made the same decision as a result of the second factor; thus, the retaliatory factor may not be a but-for cause. Without modification, the use of such a framework that does not necessarily prove but-for causation would be inappropriate in *Nassar*'s wake.

However, because *McDonnell Douglas* does not specify a causal standard, but is instead merely a method of proving it, a strong version can be conceptualized by which to prove but-for causation. Rather than disproving a single pretextual reason, a plaintiff using the strong version would be required to disprove all of the defendant's proffered reasons. If the defendant only proffered one alternative reason, proving it as a lie would invariably leave only the retaliatory reason as the but-for cause. Under this version of *McDonnell Douglas*, the factfinder must conclude that each of the defendant's proffered reasons were pretext for retaliation. That is, the factfinder must believe that the proffered reasons were lies perpetrated to cover up the retaliation, not merely honest mistakes, or lies told for a harmless reason or to cover something up other than retaliation. In such a case, the plaintiff will have proven but-for causation.

Perhaps this is the version that the pretext camp is suggesting. Such a strong version would prove but-for causation as *Nassar* requires: all of the defendant's proffered reasons, as well as all of the inferences other than retaliation that could have been drawn, will have been rejected. No independently sufficient factors would be possible, and retaliatory animus alone would remain as the but-for cause of the materially adverse action.

However, while it is true that this strong version of *McDonnell Douglas* does indeed prove but-for causation, it also goes further and proves the sole cause. Eliminating the possibility of any other factor proffered by the defendant as pretext, a plaintiff would prove not only but-for cause but also sole cause. The strong version proves the retaliatory factor as both a necessary and sufficient factor.

In their concurrence in *Burrage*, Justices Ginsburg and Sotomayor stressed that the words "because of" were not to be misconstrued as meaning "solely because of."[195] Thus, in shifting to a strong version to retain the use of *McDonnell Douglas*, we are invariably forcing the plaintiff to prove too much—in direct contravention of the will of Congress and the Supreme Court.

---

195. Burrage v. United States, 571 U.S. 204, 219 (2014) (Ginsburg, J., concurring) (citing Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 363, 383–85 (2013)). The but-for causation standard does not require that retaliation be the sole cause of the action—there can be multiple but-for causes—and retaliation need only be *a* but-for cause of the adverse action for the employee to prevail. Kwan v. Andalex Grp. LLC, 737 F.3d 834, 846 (2d Cir. 2013).

The only way around this problem is to embrace it. That is to say, yes, *McDonnell Douglas* does prove sole cause, but so what? As long as using the framework is optional and nobody is conflating sole cause with but-for cause as warned against by Justices Ginsburg and Sotomayor, it is still a useful tool. Proving discriminatory causation is tough, and there are a very few ways by which to do so. Maintaining *McDonnell Douglas* pretext evidence—evidence that does not depend on any expensive statistics, unlikely admissions, overheard statements, or differently treated comparators—even if it requires plaintiffs to prove more than required, is still a boon to them. The framework forces employers to provide a reason for their actions, giving plaintiffs a tangible object to attack and discredit. It truly is a benefit to plaintiffs, and its loss would result in one less way of accomplishing the challenging job of proving causation. The strong version laid out in this Comment may be less useful, but it still allows a plaintiff without direct evidence to prove that all of the defendant's proffered reasons are pretextual. In doing so, the plaintiff is proving sole cause, yes, but she is also proving the but-for causation required by *Nassar*. The use of anything less than this strong version of *McDonnell Douglas* would not meet *Nassar*'s causal requirements.

V. CONCLUSION

The causation standards for establishing a prima facie retaliation case and proving pretext are different. That is because the burden of establishing a prima facie case, and therefore a causal connection between retaliation and the employer's adverse employment action, is meant to be less onerous. As explained by the pretext camp, applying the ultimate causation standard, but-for, at the prima facie stage would be tantamount to eliminating the *McDonnell Douglas* framework in retaliation cases altogether. It would force plaintiffs to prove their ultimate case before they even get their cases off the ground. Consequently and ironically, the only plaintiffs who could make use of the pretext framework are those plaintiffs who do not need it. Any plaintiff that can prove but-for causation at the prima facie stage, before a defendant has provided any evidence of non-retaliatory reasons for their decision, would do so through so-called *direct* methods of proof—incriminating statements that in and of themselves evince illicit, retaliatory intent. In these cases, pretext is beside the point. Those plaintiffs who cannot satisfy the ultimate burden of persuasion without the use of pretext evidence would never make it beyond the prima facie stage to reach the pretext stage. As the court in *Foster* highlighted, had the Supreme Court

intended to retire *McDonnell Douglas* entirely, thereby setting aside forty years of precedent, it would have spoken plainly and clearly to that effect. But it did not do so.

Nothing the Court said in the *Nassar* suggests that *McDonnell Douglas* is dead. Nothing the Court says in *Nassar* alters the causation prong of a prima facie case of retaliation, either. According to the traditional application of the framework, the causal standard of the prima facie case is different than and less than a plaintiff's ultimate burden of persuasion. While it is not true that the pretext method of proof—best envisioned as a series of permissive inferences—necessarily proves but-for causation, implementation of the strong version of *McDonnell Douglas* does. Such a strong version would eliminate all independently sufficient factors by requiring the factfinder to conclude that each of the defendant's proffered reasons were pretext for retaliation. Should the Supreme Court decide to resolve the current circuit split as to whether *Nassar* affects the prima facie stage or the pretext stage, it should place the burden at the pretext stage and allow for the strong version of the framework only to survive.